No. 76-1069

In the Supreme Court of the United States

OCTOBER TERM, 1976

CANADIAN NATIONAL RAILWAY COMPANY AND CANADIAN PACIFIC LIMITED, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

WADE H. MCCREE, JR.,
Solicitor General,

DONALD I. BAKER,
Assistant Attorney General,

CARL D. LAWSON,
LLOYD JOHN OSBORN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

MARK L. EVANS,
General Counsel,

CHARLES H. WHITE, JR.,
HANFORD O'HARA,
Associate General Counsels,
Interstate Commerce Commission,
Washington, D.C. 20423.

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the decision and judgment of a three-judge district court (J.S. App. 1a-23a) affirming orders of the Interstate Commerce Commission and enjoining appellants and other railroads from further disobedience of those orders.[1]

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[1]The jurisdiction of the three-judge district court was founded on the now repealed Urgent Deficiencies Act, 28 U.S.C. 1336, 2321-2325, which under Pub. L. 93-584, 88 Stat. 1917, remained in effect as to review of proceedings filed prior to March 1, 1975. The Court's jurisdiction rests on 28 U.S.C. 1253.

In Ex Parte No. 267, *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, the Interstate Commerce Commission authorized a general increase in the freight rates of railroads operating within the United States, including the Canadian railroad appellants. As in other general revenue proceedings, the Commission in Ex Parte No. 267 focused its inquiry on the railroads' collective need for increased revenues and did not address the lawfulness of the increase as applied to particular commodities or routes. See *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 313-314. However, the Commission did authorize the carriers to make certain permissive increases to meet the varying revenue needs of railroads operating in different regions of the country, as follows (339 I.C.C. at 257):

> (1) Intraterritorial traffic within the East - not more than 14 percent.
>
> (2) Intraterritorial traffic within the South - not more than 6 percent.
>
> (3) Intraterritorial traffic within the West - not more than 12 percent.
>
> (4) Interterritorial traffic from and to all territories - not more than 12 percent.

And, as pertinent here, the Commission authorized the following general increase on "import and export traffic" (*ibid.*):

> (5) Import and export traffic not more than 12 percent and subject to the limitations heretofore prescribed in this report.[2]

[2]As the "not more than" phrasing indicates, the permissive increases authorized consisted of a range or zone within which railroad management could establish specific rates reflecting specific competitive conditions.

In purported compliance with the Commission's decision, appellants, two Canadian railroads, and other railroads filed master tariff X-267-B,[3] containing an increase of 14 percent on rail traffic (and the rail portion of water-rail traffic) moving between the United States and Canada (J.S. App. 6a-7a). Subsequently, two shippers sought a ruling from the Commission that iron ore moving from Canada to the United States, whether all-rail or water-rail, is "import traffic" within the meaning of the Ex Parte No. 267 decision and therefore subject to a maximum increase of 12 percent (J.S. App. 7a). The railroads replied, contending that the Commission's 12 percent limitation on "import and export traffic" was not meant to include traffic moving between the United States and Canada (J.S. App. 7a n. 12). On September 24, 1971, the Commission declared that "iron ore moving from Canada * * * by direct rail or by water-rail to destinations in Eastern Territory is import traffic within the meaning of that term as used in the Commission's [Ex Parte No. 267] decision."[4] The railroads complied with that ruling and corrected their tariffs to

[3]The use of a master tariff is one of the numerous procedural advantages that accrue to the railroads when the Commission authorizes a general increase. Rather than requiring the railroads to implement the authorized increase through a time-consuming republication of each of their individual commodity tariffs, the Commission permits the railroads to put the general increase into effect immediately through publication of a short-form master tariff. In Ex Parte No. 267 the Commission also relaxed the statutory 30-day notice requirement (49 U.S.C. 6(3)) and allowed the railroads to publish their master tariff on 15 days' notice. Having thus facilitated implementation of the general increase, the Commission directed the railroads to update their individual commodity tariffs as soon as possible so that shippers would be able to ascertain the current rate on particular traffic without referring to the master tariff (339 I.C.C. at 137).

[4]A copy of that unpublished order is attached as an Appendix to this motion.

reflect an increase of not more than 12 percent on all-rail and water-rail movements of iron ore from Canada (J.S. App. 7a).

Thereafter, on July 10, 1972, another shipper requested a determination by the Commission that the 12 percent limitation on import-export traffic contained in the Ex Parte No. 267 decision applied to all commodities moving from the United States into Canada (J.S. App. 7a-8a). On August 6, 1973, the Commission issued a second order construing the 12 percent limitation on import-export traffic as applying to United States-Canadian traffic and directing the railroads to correct their tariffs to reflect an increase of not more than 12 percent on all commodities moving from the United States into Canada (J.S. App. 24a-26a). Appellants and other railroads filed a petition seeking to vacate the August 6 order and requesting an oral hearing, while yet another shipper requested a determination that the 12 percent limitation applied with equal force to traffic moving from Canada into the United States (J.S. App. 8a). By order served October 10, 1973, the Commission denied the railroads' petition to vacate the August 6 order and made it clear that the 12 percent limitation on import-export traffic applied to *all* traffic moving in either direction between the United States and Canada (J.S. App. 27a-30a).

The Canadian railroads then sought judicial review, contending that the 12 percent limitation on import-export traffic was never meant to apply to United States-Canadian traffic and that the Commission had substantively modified its Ex Parte No. 267 decision without affording the railroads a hearing.[5] The three-judge district court unanimously

[5]The Eastern United States railroads moving traffic between the United States and Canada did not seek review of the Commission orders, but continued to maintain tariffs publishing a 14 percent increase on such traffic. The government filed a counterclaim before the district court for enforcement of the Commission's orders, thereby making the Eastern railroads parties to that litigation.

rejected that argument. It held that the Commission had merely interpreted and clarified its prior report and order in Ex Parte No. 267 and that further hearings were therefore not required (J.S. App. 13a-14a).[6]

ARGUMENT

The judgment of the district court is correct, and the appeal presents no substantial question warranting plenary consideration by this Court.

Appellants have never disputed the authority of the Commission in a general revenue proceeding to authorize an increase only of 12 percent on import-export traffic (including United States-Canadian traffic) while authorizing an increase of 14 percent on traffic moving within the Eastern United States. Moreover, appellants have never claimed that they could lawfully utilize the master tariff and shortened notice period to publish an increase in excess of that authorized by the Commission's general revenue order. Instead, appellants' position reduces to a dispute over the proper interpretation of the phrase "import and export traffic" as used by the Commission in its Ex Parte No. 267 decision. The district court correctly held that the 12 percent limitation on import-export traffic was intended to apply to United States-Canadian traffic and that the Commission's

[6]The court also rejected the argument of the Eastern railroad defendants as to the counterclaim that, notwithstanding the unlawfulness of the original 14 percent increase on United States-Canadian traffic published by master tariff X-267-B, the increase was somehow legitimized through the process of updating individual commodity tariffs (J.S. App. 14a-19a). The Eastern railroads did not seek further review of that issue and have not joined in the instant appeal, but instead have commenced correction of their tariffs to comply with the Commission's orders.

subsequent orders merely served to "correct the railroads' erroneous interpretation" (J.S. App. 13a) of the original report and order. There is no reason for further review by this Court of that narrow issue of interpretation.

Because the Commission's subsequent orders were merely clarifications and interpretations of the original Ex Parte No. 267 report and order, the district court properly held that no further hearing was necessary. *Pan American Petroleum Corp.* v. *Federal Power Commission*, 322 F. 2d 999 (C.A. D.C.); 5 U.S.C. 553(b)(A).[7]

Moreover, even assuming *arguendo* that the railroads were entitled to be heard regarding the proper interpretation of the Commission's Ex Parte No. 267 decision, their views on that issue have already been forcefully presented to the Commission on two occasions. When the first two shippers complained to the Commission that the railroads had taken an excessive increase on iron ore moving from Canada, the United States Eastern railroads were notified and argued that the 12 percent limitation did not apply to United States-Canadian traffic (J.S. App. 7a n. 12; but see J.S. 4-5 n. 2). Subsequently, in response to a shipper's complaint seeking reparations for overcharges on United States-Canadian traffic, appellants joined the Eastern railroads and argued that such traffic should not be considered import-export traffic within the meaning of the

[7]Appellants suggest that a hearing was necessary simply because the Commission's interpretation of its prior decision will have an adverse financial impact upon the railroads (J.S. 7 n. 3, 20-23). However, any adverse financial impact appellants may experience will be the product not of the Commission's interpretative order but of their own error in publishing rates in excess of the authorized increase.

Commission's Ex Parte No. 267 decision. The Administrative Law Judge rejected the railroads' interpretation, and the Commission adopted his decision as its own on July 30, 1974 (Docket No. 35828, unpublished).

Accordingly, it is apparent that appellants were heard. Their real complaint is that their interpretation of the Commission's decision was rejected. However, as the district court recognized (J.S. App. 13a), an agency's interpretation of its own order controls unless it is "plainly erroneous." See *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General.

DONALD I. BAKER,
Assistant Attorney General.

CARL D. LAWSON,
LLOYD JOHN OSBORN,
Attorneys.

MARK L. EVANS,
General Counsel,

CHARLES H. WHITE, JR.,
HANFORD O'HARA,
Associate General Counsels,
Interstate Commerce Commission.

MARCH 1977.

DOJ-1977-03

APPENDIX

SERVICE DATE
SEPTEMBER 24, 1971

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 19th day of August, 1971.

EX PARTE NO. 267

INCREASED FREIGHT RATES, 1971

Upon consideration of the record in the above-entitled proceeding, a petition for supplemental order filed July 9, 1971, by Alan Wood Steel Company, petition for leave to intervene filed July 20, 1971, by Jones and Laughlin Steel Corp., a petition for leave to file and accompanying petition of intervention, filed August 12, 1971, by Bethlehem Steel Corp., a petition for leave to file representations filed August 17, 1971, by Youngstown Sheet and Tube Company, and of replies to the aforesaid petitions filed July 29, 1971, and August 16, 1971, by Eastern Territory railroad respondents and;

It appearing, That rates on iron ore moving from origins in Canada to destinations in Eastern Territory published by the respondent Eastern railroads have been increased 14 percent pursuant to the increase authorized in Ex Parte No. 267 for rates within Eastern Territory and;

It further appearing, That the authority granted by the decision of the Commission in Ex Parte No. 267 for increases on import traffic was limited to 12 percent.

And it further appearing, That, upon consideration of the facts and arguments of the parties, iron ore moving from Canada, as described in the petitions, by direct

rail or by water-rail to destinations in Eastern Territory is import traffic within the meaning of that term as used in the Commission's decision, and good cause appearing therefor;

It is ordered, That Jones and Laughlin Steel Corp. be, and it is hereby, permitted to intervene in this proceeding;

It is further ordered, That the petition of Bethlehem Steel Corp. and Youngstown Sheet and Tube Company for leave to file certain accompanyimg pleadings be, and they are hereby, denied;

It is further ordered, That the petition of Alan Wood Steel Company for an appropriate Order of the Commission, be, and it is hereby, granted;

And it is further ordered, That the respondents be, and they are hereby, required to cease and desist from assessing rates and charges on import iron ore as described in the petitions which are increased by more than 12 percent over the Ex Parte 265 level and to take appropriate action to correct their tariffs not less than 10 days from the service date of this order.

By the Commission.

ROBERT L. OSWALD
Secretary